APPENDIX A.

UNITED STATES DISTRICT COURT.

N. D. Illinois, E. D.

June 27, 1966.

LYLE A. DESPAIN and MARY R. DESPAIN, individually, and as parents and natural guardians of Laura I. DeSpain, a minor, and as taxpayers on Behalf of themselves and all other persons similarly situated,

Plaintiffs,

vs.

DEKALB COUNTY COMMUNITY SCHOOL DISTRICT 428, a body politic, THE BOARD OF EDUCATION OF DEKALB COUNTY COMMUNITY SCHOOL DISTRICT 428, MARVIN L. BERGE, ESTHER WATNE and GEORGE P. RICCIO,

Defendants.

No. 66 C 543.

DECISION ON MERITS ON COMPLAINT FOR INJUNCTION.

ROBSON, *District Judge.*

Plaintiffs seek an injunction against the alleged violation of their constitutional rights by virtue of the recital in

the kindergarten class which their child, Laura I. DeSpain, attends, of the following verse, which they deem to be a prayer:

"We thank you for the flowers so sweet;
We thank you for the food we eat;
We thank you for the birds that sing;
We thank you for everything."

The complaint states that defendant Marvin L. Berge is superintendent of schools of DeKalb County Community School District 428; that George P. Riccio is the principal of the Ellwood Public School in DeKalb County Community School District 428, and that Esther Watne is the Kindergarten teacher in that school who instructs the child. The complaint further alleges that from the commencement of the 1965-1966 school year until the present date Mrs. Watne has conducted the "prayer" and has required all of her students, including Laura, to fold their hands in their laps, close their eyes and assume a traditional devotional and prayerful attitude immediately prior to its recitation.

It is also alleged that the parents do not believe in the existence of a divine being who hears or responds to prayers or supplications, and that the recitation of the daily prayer constitutes the establishment of a religious practice and inhibits and restricts the free exercise of plaintiffs' religious beliefs and practices. Despite repeated protests by plaintiffs, defendants have failed and refused to stop or prohibit the recitation of the prayer, and unless restrained, will continue to do so, thereby violating plaintiffs' constitutional rights under the First Amendment.

Count II reiterates the foregoing allegations and charges their rights under the Illinois Constitution, Article II § 3, S. H. A., are violated. Plaintiffs are thereby required to support a place of worship without their consent. Count

III, in addition to the above allegations, states that plaintiff parents are taxpayers of the State of Illinois, and that a portion of federal taxes is allocated to the School, as well as the state taxes, which action is in derogation of plaintiffs' rights and privileges under the First Amendment to the Federal Constitution and the Illinois Constitution.

The court has heretofore denied the prayer for relief by preliminary injunction. A full hearing has now been had on the merits.

The controversy resolves down to the narrow issue whether the verse above-quoted is to be considered a prayer and if so whether its recital is proscribed by constitutional prohibitions as interpreted by the many decisions.

Preliminarily, it might be said that it is regrettable that this problem could not have been amicably solved by conference between the parties without the interjection of a lawsuit and subjecting small children, the school, and the community to the disturbing influence of litigation. While few things can be considered more important than constitutional rights, infinitesimal invasions which could be rectified by minor adjustment of phraseology, such as the substitution of the word "grateful" for "thank you" in the verse would instill in the child appreciation for the world around him and foreclose all imputation of a prayer. However, in view of plaintiffs' attitude it is doubtful if this would have satisfied them.

It is the defendants' earnest position that this verse is but one of many routinely recited throughout the day aimed to instill in the child his place in society and the community and to inculcate good manners, graciousness, and gratefulness into his character. The many exhibits indicate that through verse, the child is taught to realize his dependence upon tradespeople who serve him: the milkman,

the mailman, the plumber, and similar occupations. Further, he is taught to observe natural phenomena, such as rocks, the sun, bird migration, flowers, birds, and other subjects about him. His attention is called to weather conditions: rain, fog, snow, etc. He is taught politeness: to say thanks, pardon me, etc. The secular kindergarten curriculum stresses the saying of thanks. The child is instructed in "finger exercises," which explains, defendants insist, the putting of the child's hands in his lap prior to taking milk and crackers. The gesture is made for the practical purpose of preventing one child partaking of his food before another does so and from spilling the milk or dropping the crackers.

The court concludes that the verse, recited in the setting proved by the testimony in this case, is not a prayer or religious activity within the meaning of the Constitution, and that the instant complaint must be dismissed for failing to state a cause of action. The conclusion is based on these considerations:

1. The teacher used the verse with the prime objective of making the child aware of the beauties of the world around him and grateful for them. The "purpose and primary objective" of the verse was not religious.

2. The aim of inculcating good manners in the children, the mode of proper serving of a meal, and awaiting eating until all were served, and thanking donors of special treats, were paramount in the teacher's purposes.

3. No complaint was made by plaintiffs to the school authorities that the children closed the verse by saying "Amen," by crossing themselves, or that they bowed their heads, all of which leads to the inference that no such acts took place. That conclusion is fortified by testimony of disinterested witnesses, as well as defendants. It is probable that any such acts which may have occurred, and

which escaped the teacher's attention, were due to the children's own ideas, or their extracurricular training.

4. The very widespread use of this verse in kindergarten curricula outside of DeKalb is indicative that its use was thought by many to be secular rather than religious.

5. Substantial latitude must be afforded a teacher in her choice of mode of instruction and a court should exercise great care not to proscribe educational freedom.

6. Plaintiffs' complaint states they believe in no form of supplication to a divine being. The court does not believe that the instant verse offends that right, in that it simply expresses gratitude.

The evidence is in complete contradiction as to whether the children took a "devotional attitude" in reciting the prayer. The plaintiffs testified that some of the children said "Amen" at the conclusion of the verse, and some crossed themselves. The defendants, and presumably impartial witnesses called by them—parents of other children —testified that they saw *no* instance of such action at anytime. Plaintiffs testified the children's heads were bowed; defendants' proof was that the children looked around at each other, at the teacher, or at the food.

The court, therefore, considers the character of the recital without regard to that aspect of the allegations, they not having been convincingly proved. If it were indispensable that a conclusion be drawn on that factor, the court would be inclined to believe that any such action on the part of the child was due to habits formed outside the class, which totally escaped Mrs. Watne's observation, and were certainly beyond her instruction and not the result of any intent on her part. The court is not convinced that such devotional acts actually occurred.

Summary of the Evidence.

Father A. Donald Davies, an Episcopal priest, a Professor of Christian Education and Director of the Master of Arts program in Christian Education, employed at the Seabury-Western Theological Seminary, testified directly that the verse with the word "God" in the last line is a prayer, and part of the religious education of Episcopal children. He also stated that the verse recited in the instant complaint is a prayer, and the deletion of the word "God" did not change his opinion that it was a prayer. He felt that even with the word deleted the "intent is to offer thanks to God." He stated the purpose of the prayer is "to guide the children in their understanding of God as a creator, and with an expression or response upon their part in the offering of thanks, in a communication to the deity or to God, and as such I would have to wonder who the 'you' is."

However, in answer to a question on cross-examination that on the assumption there is no God, whether it would be useful for a five-year old child to recite the poem in order to get a feeling of integration in his physical environment, he stated that "it is possible that it might be meaningful." In answer to the court's interrogation as to whether the verse, completely isolated, was a prayer, Fr. Davies said: "Completely isolated, I would have to say that it would not be." Nor would it be where it followed the thanking of persons who had made special donations of cakes.

This interrogation occurred in his testimony:

"The court: So taken as an isolated statement, in and of itself, it is not a prayer? Is that your conclusion?

"A. Right, isolated."

Dr. John E. Burkhart, affiliated with the United Presbyterian Church, who is on the faculty of the McCormick

Theological Seminary, and Curriculum Consultant for the Presbyterian Board of Christian Education, testified for the plaintiffs. He defined "prayer" thus: "Prayer is that religious activity and/or attitude in which divine powers are addressed explicitly or implicitly, publicly or privately." As to the verse here in question, he stated: "This clearly is a prayer, both in form and intention. * * * The 'you' which is the functional word in this prayer would be obviously addressed to someone who is thought to provide everything." He thought it a rather poor adaptation of the verse which first appeared in print in "A Child's Book of Prayers" in 1941 under the name of Mrs. Latham. Many children learn it in Sunday School and "[I]t is, therefore obviously in connotation and usage a religious act." He also said:

> "It does not stop being a prayer when the word 'God' is removed, since the children who use it as a prayer * * * use it and understand it as a prayer. So, in common context it is a prayer which has simply been modified, but has not lost its prayer connotation or meaning."

On cross-examination, another book which had the same verse, copyrighted in 1935, the Silver Book of Songs by a Mrs. Perkins, was the subject of interrogation. The title page stated it was compiled by *public school administrators* and teachers of music.

Dr. Burkhart further testified:

> "* * * I understand that one is properly grateful only to God for everything, if one is a believer. And if one is not a believer, such a statement is both meaningless and offensive if it is forced on one."
>
> * * * * *
>
> "It is not clear to me that something becomes a prayer by the use of the word 'God' or is not a prayer if 'God' is not mentioned."

Several parents testified as to their observations on visiting Mrs. Watne's class. Mrs. Schrowenger visited in February, 1966, and testified she did *not* notice the children looking anywhere special when the verse was said; that their eyes were open; that she saw *no* one cross himself and recalled hearing no one say "Amen."

Mrs. Randall testified that at the time of the verse she could not see the children's hands but the attitude of their heads was that they "just sat there looking around or nudging. * * *" Their heads were *not* bowed. She saw *no* child cross himself nor say "Amen."

Mrs. Carr testified the children had their hands in their laps and the children "were either looking around the room or at Mrs. Watne." Their heads were at no time bowed; no child crossed himself, nor said "Amen." She said the children were looking at the food and were excited about it.

Mrs. Forster testified she had been to the class five times. She testified that during the recital of the verse some of the children were looking at the teacher, some at her, some glancing sideways at their neighbor's plate to see who had the largest cookie or something like that. She saw nothing that might be interpreted as a requirement by Mrs. Watne that the children close their eyes or assume a devotional attitude; that there was no difference in the way the children said this verse from any other; that she heard no child say "Amen."

Defendant Marvin L. Berge, the superintendent of schools of DeKalb County Community School District 428, had occupied that position for ten years. He had been a curriculum director of Elgin, Illinois schools. He had read very thoroughly the Report of the Commission on Religion in the public schools of the American Association of School Administrators, a special committee appointed to study this particular problem and he followed it as a guide. He

testified that "I suspect I have * * * heard that poem recited hundreds of times in my experience, and *I have never felt that it had any religious connotation to it.*"

Mr. Berge further testified that on neither occasion when the DeSpains visited him did they make complaint that in Mrs. Watne's room children were crossing themselves. He also felt that it would *not* be proper for "a plain, ordinary non-denominational prayer [to be said] * * * without comment, in the public school by a teacher and the children * * * instructed to recite it." When the court asked whether the verse is generally used in the public schools in connection with an occasion such as the serving of milk and crackers, he answered, "It is used very extensively in kindergartens," throughout the school systems with which he had been associated. He had first heard the verse back in about 1923.

Defendant George P. Riccio, principal of the Ellwood Public School, testified to Mrs. DeSpain's objection to the recital of the verse, but there was no complaint made about the children crossing themselves or assuming a devotional attitude. He further testified as to his observation of the children and stated, "They were seated at a table and they were having a conversation and visiting with one another. Their hands were in their laps." He said the position of their heads was up, that he never saw anyone take a devotional attitude and saw no one cross himself.

Mrs. Eychaner, a member of the Board of Education, testified as to the plaintiffs' appearance before the Board and that they made no complaint of any child making the sign of the cross. She further testified that the Board "believed we were operating within the law and obeying the Supreme Court decision and that this was within the teacher's right to conduct her classroom according to her curricular standards" as long as she obeyed the Supreme Court.

Mr. Montavon, a farmer, president of the Board, stated his testimony would be the same as Mrs. Eychaner.

Dr. Edra Lipscomb, who holds a certificate in primary kindergarten work, a professor in the Educational Department at Northern Illinois University, testified that verses of the kind alleged in the complaint are commonly used, and the teachers had not considered it a prayer exercise. At a kindergarten workshop she had inquired of forty kindergarten teachers how many used verses such as this and they all said they did. The thank you verse, she testified, "would certainly fit part of this philosophy of helping the children not [only] prepare themselves for life but actually become a part of the living society." On cross-examination she testified that kindergarten teachers were instructed by the Superintendent of the Lab School of Northern Illinois University not to require the children to use a verse very similar to this verse.

The Law.

The Supreme Court opinions have with exhaustive thoroughness researched the historical background of the Constitutional Amendments here involved. No discussion by this court could enhance the subject. The First Amendment to the Constitution provides:

> "Congress shall make no *law* respecting an establishment of religion, or prohibiting the free exercise thereof * * *." (Emphasis added.)

The Fourteenth Amendment provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State [shall make or enforce any *law* which] shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

It is notable that both constitutional provisions contemplate the proscription of *laws* in respect to religion. There has been no law by a governmental body requiring the use of this verse. There has not even been a regulation by an educational board, or superintendent, authorizing its use. The closest it comes to official action is the omission of a board, superintendent or principal to bar the use of the verse upon it being brought to their attention. Its use could be eliminated in a day—which might be commendable—or it could be once more revised, as it has heretofore been. Its use has none of the rigidity of a promulgation by statute or regulation, and therefore no hazard of assured continuance.

Thus in the opinion of the Supreme Court in *School District of Abington Tp., Pa.* v. *Schempp,* 374 U. S. 203, at 220, 83 S. Ct. 1560, 1570, 10 L. Ed. 2d 844, the court quotes from an earlier opinion:

> "'[N]either a state nor the Federal Government • • • can constitutionally pass *laws* or impose requirements which aid all religions. • • •'" (Emphasis added.)

On page 222, 83 S. Ct. on page 1571 of the same case, it is said:

> "• • • [I]t has consistently held that the clause [First Amendment] withdrew all *legislative* power respecting religious belief or the expression thereof. The test may be stated as follows: what are *the purpose and the primary effect of the enactment?* If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular *legislative* pur-

pose and a primary effect that neither advances nor inhibits religion. * * * The Free Exercise Clause, likewise considered many times here, withdraws from *legislative* power, state and federal, the exertion of any restraint on the free exercise of religion." (Emphasis added.)

In the *Schempp* case, supra, the state law required that at least ten verses from the Holy Bible be read, without comment, at the opening of each school day, but any child could be excused upon written request from the parent. The Lord's Prayer was also recited. In the companion case decided in the *Schempp* case, supra, the Board of School Commissioners of Baltimore City adopted a *rule* providing for the holding of opening exercises consisting primarily of the reading, without comment, from the Bible and/or the use of the Lord's Prayer. The court quoted from a prior opinion, at 216, 83 S. Ct. at 1568:

"* * * [T]he effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. * * *"

It is said, at 218, 83 S. Ct. at 1569:

"* * * [P]ublic schools are organized 'on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion.' "

It is further stated, at 219, 83 S. Ct. at 1570:

"* * * [T]he Constitution * * * prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts * * *."

In the *Schempp* case, supra, it was said, at 220, 83 S. Ct. at 1570:

> "• • • [N]either a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can *constitutionally pass laws or impose requirements* which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs. • • •" (Emphasis added.)

It is said, at 224, 83 S. Ct. at 1572:

> "The conclusion follows that in both cases the *laws require* religious exercises and such exercises are being conducted in direct violation of [constitutional] rights • • •.
>
> "• • • [I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent • • •." (Emphasis added.)

Justice Brennan in his concurring opinion states, at 230, 83 S. Ct. at 1576:

> "• • • It is therefore understandable that the constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom."

He further stated, at 231-232, 301, 83 S. Ct. at 1576:

> "• • • [T]he line which separates the secular from the sectarian in American life is elusive. • • •"
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> • • • • •
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> "• • • *While it is my view that not every involvement of religion in public life is unconstitutional,* I consider the exercises at bar a form of involvement which clearly violates the Establishment Clause."
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> "We do not, however, in my view usurp the juris-

diction of school administrators by holding as we do today that morning devotional exercises in any form are constitutionally invalid." (Emphasis added.)

The court appreciates the danger inherent in seemingly innocuous practices. Thus the Supreme Court in *Engel* v. *Vitale,* 370 U. S. 421, at 436, 82 S. Ct. 1261, at 1270, 8 L. Ed. 2d 601 (1962), quoted from James Madison, the author of the First Amendment, that " '[I]t is proper to take alarm at the first experiment on our liberties.' "

In *Chamberlin* v. *Dade County Board of Public Instruction,* 377 U. S. 402, 84 S. Ct. 1272, 12 L. Ed. 2d 407 (1964), the Supreme Court in a per curiam opinion held that devotional Bible reading, which was required by *statute* in the Florida public schools, was unconstitutional, basing its decision on the *Schempp* case, supra.

In *Engel* v. *Vitale,* 370 U. S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962), it was held that because of the prohibition of the First Amendment against the enactment of any *law* "respecting an establishment of religion," which is made applicable to the States by the Fourteenth Amendment, state officials may not compose an *official* state prayer and *require* that it be recited in the public schools of the State at the beginning of each school day—even if the prayer is denominationally neutral and pupils who wish to do so may remain silent or be excused from the room while the prayer is being recited. In that case, the Board of Education, *acting in its official capacity under state law, directed* the school district's principal to cause the prayer to be said aloud by each class in the presence of the teacher at the beginning of each school day. The prayer was:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

The court cited the fact that the procedure was adopted on the recommendation of the State Board of Regents, a governmental agency created by the State Constitution to which the New York legislature has granted broad supervisory, executive, and *legislative* powers over the state's public school system. The officials composed the prayer which they recommended and published as a part of their "Statement on Moral and Spiritual Training in the Schools." The parents there complaining challenged the constitutionality of both the state law authorizing the School District to direct the use of prayer in public schools and the School District's regulation ordering the recitation of this particular prayer.

The Supreme Court there said, at 424-425, 82 S. Ct. at 1264:

> "* * * There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and *supplication* for the blessings of the Almighty." (Emphasis added.)
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> • • • • •
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> "* * * [T]he constitutional prohibition against *laws* respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose *official prayers* for any group of the American people to recite as a part of a religious program carried on by government." (Emphasis added.)

It further said, at 430, 82 S.Ct. at 1266:

> "* * * Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, *is without power to prescribe by law* any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

"There can be no doubt that New York's state prayer program *officially* establishes the religious beliefs embodied in the Regents' prayer. * * * The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and *is violated by the enactment of laws* which establish an official religion whether those laws operate directly to cover nonobserving individuals or not." (Emphasis added.)

It stated at, 431-432, 82 S.Ct. at 1267:

"* * * The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal * * * to permit its 'unhallowed perversion' by a civil magistrate."

It stated at 433, 435, 82 S.Ct. at 1265:

"* * * The New York laws officially prescribing the Regents' prayer are inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself."

* * * * *

"* * * It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."

The People of State of Ill. ex rel. McCollum v. *Board of Education*, 333 U. S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948), case held that the utilization of the State's tax-supported public school system and its machinery for compulsory public school attendance to enable sectarian groups to give religious instruction to public school pupils in public school buildings violates the First Amendment of the Constitution, made applicable to the states by the Fourteenth Amendment. In that case, with the permission of a Board

of Education, granted under its general supervisory powers over the use of the buildings, religious teachers, employed subject to the approval and supervision of the superintendent of schools by a private religious group including representatives of the Catholic, Protestant and Jewish faiths, gave religious instruction. Pupils whose parents so requested were excused from their secular classes during the periods of religious instruction and were required to attend the religious classes; but other pupils were not released from their public school duties, which were compulsory under state law. In that case, it was an admitted fact that the challenged program of religious instruction was not expressly authorized by statute.

The court said, at 210, 212, 68 S.Ct. at 465:

> "No tax in any amount, large or small, can be levied to support any religious activities * * * whatever form they may adopt to teach or practice religion."
>
> * * * * *
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> "Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State."

The Second Circuit case, *Stein* v. *Oshinsky*, 348 F.2d 999 (1965), was an action by parents to *enjoin school officials from preventing the recitation* of prayers on the children's initiative. The District Court had granted summary judgment to the parents, which judgment was reversed on the ground that the constiutional rights to free exercise of religion and to freedom of speech do not require a state to permit "student-initiated" prayers in public schools. The poem there involved was similar to the one *formerly* used by Mrs. Watne, including the reference to God. The court

called it "the simple and ancient prayer." The principal ordered it stopped being said in kindergarten. The court said, at 1001:

> "We likewise cannot sustain defendants' contention that the complaint did not sufficiently raise a claim of denial of constitutional rights to the free exercise of religion and to freedom of speech * * *."
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> * * * * *
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> "[W]e shall assume, *arguendo,* in plaintiffs' favor that the Establishment Clause would *not* prohibit New York from permitting in its public schools prayers such as those here at issue. Nevertheless New York is not bound to allow them unless the Free Exercise Clause or the guarantees of freedom of speech of the First Amendment compels.
>
> "Neither provision requires a state to permit persons to engage in public prayer in state-owned facilities wherever and whenever they desire." (Emphasis added.)

The court pointed out, at 1002:

> "*Determination of what is to go on in public schools is primarily for the school authorities.* * * * The authorities acted well within their powers in concluding that plaintiffs must content themselves with having their children say these prayers before nine or after three; their action presented no such inexorable conflict with deeply held religious belief * * *. After all that the states have been told about keeping the 'wall between church and state * * * high and impregnable,' * * * it would be rather bitter irony to chastise New York for having built the wall too tall and too strong." (Emphasis added.)

The court concludes that this is a case *de minimis.* Despite the theologians' characterization of this verse as a prayer, the court believes that set in the framework of the whole school day, its purpose was not to pray but to instill in the children an appreciation of and gratefulness for the

world about them—the birds, the flowers, the food, and everything. They asked no blessing; they sought no divine assistance.

The teacher was exercising her pedagogical function of making the pupils socially acceptable persons, as well-mannered guests, grateful in their appreciation of their provider. She sought to make all wait until the last was served before they began eating, and then to pause before eating to impress upon them the wonders of the world about them, including food. The verse might be compared to those found in "A Child's Garden of Verses" by Robert Louis Stevenson, entitled, "A Thought":

> "It is very nice to think
> The world is full of meat and drink,
> With little children saying grace
> In every Christian kind of place,"

or the couplet, "Happy Thought":

> "The world is so full of a number of things
> I'm sure we should all be as happy as kings."

A multitude of other poems of similar purport by noted poets could be cited.

The court believes that this case presents the situation characterized by Justice Goldberg in the *Schempp* case, supra, 374 U. S. at 308, 83 S.Ct. at 1616, thus:

> "It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and *mere shadow.*" (Emphasis added.)

The instant verse seems precisely that: a mere shadow rather than a real threat.

This is not a case, such as the many precedent outlined above, of *legislative or regulatory fiat* that defined religious activity to be followed. Here was one teacher using a curriculum widely recognized in kindergartens. It was

her choice to utilize the verse—no legislature, superintendent of schools, Board of Education or principal demanded its continued use. She felt it was in accord with all her other exercises in instilling social realization and graces in the children. Its religious connotation, if any, was completely incidental to implanting gratitude in the child for the things about them, irrespective of who placed them there.

The defendants showed amenability to respecting plaintiffs' religious beliefs and sought to solve the complaint by deleting the reference to "God" from the verse, thereby, in their eyes nullifying any imputation of a prayer, but retaining all the secular aims sought to be achieved. The court would be very reluctant to substitute its views as to how the aims of this kindergarten teacher to implant graciousness and gratitude in very young children should be accomplished. That not only she, but many others, thought well of this verse is amply demonstrated in the evidence. Its broad use suggests it was felt to have value and merit, and was not considered a prayer in a religious sense.

The court is of the opinion that the facts of this case do not warrant its intervention under the guise of enforcement of constitutional rights into the educational program of this kindergarten curriculum. The so-called violation of the rights of plaintiffs is, if anything, "a mere shadow" rather than "a real threat" and on this basis the court is asked to become the arbiter of a kindergarten curriculum. Our system of education has assumed world preeminence through scholastic independence. If the courts allow themselves to be injected into a dispute, such as this, scholastic independence would disappear and our educational processes become sterile. This was not the intent of the drafters of the First and Fourteenth Amendments to our Constitution.

In view of this conclusion, it is hereby ordered that the complaint be dismissed for failure to state a cause of action.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

No. 15836 SEPTEMBER TERM, 1966 APRIL SESSION, 1967

LYLE A. DESPAIN and MARY R. DESPAIN, *et al., etc.*, *Plaintiffs-Appellants*,
v.
DEKALB COUNTY COMMUNITY SCHOOL DISTRICT 428, *et al., etc.*, *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JULY 26, 1967

Before SCHNACKENBERG, SWYGERT, and FAIRCHILD, *Circuit Judges.*

SWYGERT, *Circuit Judge.* The plaintiffs, Lyle A. DeSpain and Mary R. DeSpain, are residents of DeKalb, Illinois. They are the parents of Laura I. DeSpain, who at the time the complaint was filed, was five years old and attended kindergarten class at the Ellwood Public School, located in DeKalb County Community School District 428. The plaintiffs brought this action under 28 U. S. C. §1343(3) to enjoin the officials of the school district from requiring the plaintiffs' child to recite a prayer during regular school hours. Besides the school

district, individually named defendants include the members of the Board of Education and the superintendent of schools, the principal of the Ellwood Public School, and the kindergarten teacher, Esther Watne, who instructed Laura I. DeSpain.

Following a consolidated evidentiary hearing on the request for temparary and permanent injunctive relief, the district court dismissed the plaintiffs' complaint for failure to state a cause of action. *DeSpain* v. *DeKalb County Community School Dist. 428*, 255 F. Supp. 655 (N. D. Ill. 1966). The court ruled that a verse which Mrs. Watne, the kindergarten teacher, required the children in her class to recite prior to their morning snack is "not a prayer or religious activity within the meaning of the Constitution. . . ." The verse read:

> We thank you for the flowers so sweet;
> We thank you for the food we eat;
> We thank you for the birds that sing;
> We thank you for everything.

We are of the view that the verse is a prayer and that its compulsory recitation by kindergarten students in a public school comes within the proscription of the first amendment, as interpreted by the Supreme Court in the "school prayer" cases. *School Dist.* v. *Schempp*, 374 U. S. 203 (1963); *Engel* v. *Vitale*, 370 U. S. 421 (1962). Accordingly, we reverse.

The evidence showed that for several years prior to the 1965-66 school year Mrs. Watne required the children in her kindergarten class to recite a verse identical to the above-quoted verse except that the last line read, "We thank you, God, for everything." In 1964 Mrs. Watne deleted the word "God," after the plaintiffs complained to Mrs. Watne, the superintendent of schools, the principal, and the Board of Education that the DeSpains'

eldest son, then a kindergarten student, was required to recite the verse.

Mrs. DeSpain, who visited the kindgarten class on two occasions, and her daughter testified that immediately before and during the recitation of the verse in question the children folded their hands in their laps and closed their eyes. They also testified that at the conclusion of the verse many children said "Amen." The DeSpains' son testified that during the prior year the conduct of the children during the recitation of the verse was the same. On the other hand, several mothers of other children and Mrs. Watne testified that they did not see the children in a reverential attitude, nor did they hear any of the children say "Amen" after the recitation of the verse.[1]

Dr. A. Donald Davies, an Episcopal priest employed at Seabury Western Theological Seminary, Evanston, Illinois as a professor of Christian Education and Director of the Master of Arts program in Christian Education, testified that a prayer practically identical to the verse recited in Mrs. Watne's class, with the word "God" included in the last line, is found in a manual entitled "God's Love and Care," published by the National Department of Christian Education of the Episcopal church for the training of kindergarten teachers. Dr. Davies further testified that in his opinion the verse at issue is a prayer regardless of the fact that the word "God" was deleted from the last line, that "the intent is to offer thanks to God." In response to a question by the district judge, Dr. Davies stated that if the verse were com-

[1] The conflicts in the evidence relating to the conduct of the children during the recitation of the verse were resolved in the defendants' favor by the district judge. We believe that the attitude of the children during recitation is immaterial to a determination of the ultimate question which we must decide: Was the required recitation of the verse a proscribed public school activity?

> and everything. They asked no blessing; they sought no divine assistance. *Id.* at 664.

Both in *School Dist.* v. *Schempp, supra,* and in *Engel* v. *Vitale, supra,* the Supreme Court admonished the state to observe strict neutrality with respect to religion in public schools. Mr. Justice Clark, speaking for the Court in *Schempp,* referred to the fact that the Supreme Court has consistently held that the establishment clause in the first amendment withdrew all legislative power respecting religious belief or the expression thereof. He then stated the test:

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. 374 U. S. at 222.

Mr. Justice Black, speaking for the Court in the earlier *Engel* case, reviewed the historical purposes underlying the establishment clause. There he wrote:

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and

> even contempt of those who held contrary beliefs. 370 U. S. at 431.

Neither the *Engel* nor the *Schempp* decision was an attack upon Christianity, religion, or prayer; those cases merely articulated within factual contexts the principles of the first amendment, which was designed to provide a bulwark against those who wish to impose their religious beliefs upon others through governmental action. Thus Mr. Justice Black continued in *Engel*:

> It is neither sacrilegious nor anti-religious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance. *Id.* at 435.

With these Supreme Court pronouncements in mind, an application of the test laid down by Mr. Justice Clark in *Schempp* to the facts of this case convinces us that the so-called "secular purposes" of the verse were merely adjunctive and supplemental to its basic and primary purpose, which was the religious act of praising and thanking the Deity.

It is not to be gainsaid that the verse may have commendable virtues in teaching kindergarten children "good manners" and "gratitude," to use Mrs. Watne's words. The fact, however, that children through the use of required schoolroom prayer are likely to become more grateful for the things they receive or that they may become better citizens does not justify the use of compulsory prayer in our public school systems. As the plaintiffs point out, if prayers which tend to teach and inculcate these virtues are not within the ambit of the bar imposed by the first amendment against such religious activity, any religious activity of whatever nature could be justified by

public officials on the basis that the activity has beneficial secular purposes; as a result the Supreme Court's admonitions in *Engel* and *Schempp* would become meaningless.

The Second Circuit in *Stein* v. *Oshinsky*, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U. S. 957 (1965), was presented with a problem similar to the one with which we are faced. In that case a principal of a New York City school ordered the kindergarten teachers, in the language of the complaint, "to stop the infant children from reciting the simple and ancient prayer: 'Thank You for the World so Sweet, Thank You for the Food We Eat, Thank You for the Birds that Sing—Thank You, God, for Everything.' " The plaintiffs, parents of children attending the school, demanded that the school officials give their children an opportunity to recite voluntary prayers in the classroom. When the school officials ignored the demand, suit was instituted in the federal court to force them to grant it. The district court granted the requested relief. The court of appeals reversed the decision, holding that neither the free exercise clause nor the guarantee of freedom of speech of the first amendment requires a state to permit students to engage in public prayer in state-owned facilities "whenever and wherever they desire." In the course of its opinion, the court stated:

> Determination of what is to go on in public schools is primarily for the school authorities. Against the desire of these parents that their children "be given an opportunity to acknowledge their dependence and love to Almighty God through a prayer each day in their respective classrooms," the authorities were entitled to weigh the likely desire of other parents not to have their children present at such prayers, either because the prayers were too religious or not religious enough; and the wisdom of having public educational institutions stick to education and keep out of religion, with all the bickering that intrusion into the latter is likely to produce. The authorities acted well within

> their powers in concluding that plaintiffs must content themselves with having their children say these prayers before nine or after three. *Id.* at 1002.

It will be noted that the verse with which the Second Circuit was concerned and the verse at issue here are identical except that in *Oshinsky* the last line contained the word "God." We think this is a distinction without a difference in view of the testimony of Mrs. Watne and the theologians who appeared as witnesses.

The district court characterized this case as *de minimis*. We are tempted to agree. Certainly, this verse was as innocuous as could be insofar as constituting an imposition of religious tenets upon nonbelievers. The plaintiffs have forced the constitutional issue to its outer limits. We are reminded, however, of what the Supreme Court said in *Schempp*:

> [I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent. . . . 374 U. S. at 225.

With respect to this facet of the case we also have in mind what the Court said in *Everson* v. *Board of Education*, 330 U. S. 1, 18 (1947): "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."

The judgment of the district court is reversed.

SCHNACKENBERG, *Circuit Judge*, dissenting.

A witness for plaintiffs, Reverend A. Donald Davies, an Episcopalian priest, testified that he was familiar with the curricular content of manuals used in kindergartens, and

that in all of them which he had seen there is some verse "like this",[1] in which the child expresses that he has received all of the things mentioned, by saying "thank you" for them. Reverend Davies insisted, however, that the verse in question with "God" removed "is still a prayer". But he admitted that, with the word "God" left out, "They might regard that, then, as an expression of gratitude to the community of animate and inanimate and human things in which they live."

A witness for defendants was Edra Lipscomb,[2] a kindergarten teacher for 19 years, and now a professor at Northern Illinois University, teaching kindergarten courses. According to her testimony, the curriculum followed at the school here involved is typical of kindergarten curriculums now in use, as embodied in a comprehensive compilation thereof introduced in evidence. As to the particular verse under attack in this case, Mrs. Lipscomb testified that verses of this kind are commonly used, and they are not regarded as prayer exercises. She also swore that in a kindergarten workshop in 1964, where she had 40 kindergarten teachers participating, she ascertained that all of those present used such a verse, the purpose of which

> "is to help the youngsters become a part of the world around them, and so they do a lot of things in the kindergarten as a part of introduction into society, into the culture, and this 'thank you' verse would certainly fit part of this philosophy of helping the children not prepare themselves for life but actually become a part of the living society, contributing society. Also, it is used to establish a quiet atmosphere in preparation for food."

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[1] We thank you for the flowers so sweet;
We thank you for the food we eat;
We thank you for the birds that sing;
We thank you for everything.

[2] She was educated at the University of Illinois, Southern Illinois University, University of Michigan and Indiana University.

Thus the record of the district court reveals that the daily kindergarten schedule, which was used at the school in question, provides for the children to recite:

> Every morning when the sun comes smiling up on everyone
> It's lots of fun to say good morning to the sun.
> Good morning, Sun.

1. We would not be justified in disturbing the findings of fact of the district court; in fact, we are not asked to do so. Certainly we should not rationalize (as do plaintiffs) that the elimination of the word "God" from a verse tends to prove that what remains is a prayer. The verse which remained to be recited by the pupils, after they were served cookies and milk, undoubtedly reflects in their young minds the pleasant prospect of eating. Naturally the recitation of the verse was a vocal expression of their gratitude. Moreover, this court has no right to take on the burden (which plaintiffs have voluntarily assumed) of establishing that a benefactor, to whom each child feels he is speaking, is a deity.

Human lives are replete with incidents where happy or wondrous events evoke voluntary, deep-seated emotions from those who witness them or participate therein. For instance, people may look at a glowing sunset and in admiration exclaim "Thanks for the opportunity of seeing that!" While one who overhears the exclamation might wonder why the remark was made, the fact remains that it is not a prayer. The expression of thanks evinces a sense of gratitude. And gratitude is a virtue, whether evoked by the marvels of nature or by the unidentified suppliers of tasty cookies and milk to kindergarten pupils. The enraptured viewer of the sunset, as well as each eager, usually hungry, child, gives expression to his gratitude.

Despite the elimination of the word "God" from the chil-

dren's recital of thanks, plaintiffs maintain, in effect, that that word is still there in the minds of the children. Thus we are asked as a court to prohibit, not only what these children are saying, but also what plaintiffs *think* the children are *thinking*. Certainly thought is a matter varying with each child, be he Christian, Jew, atheist or agnostic. One who seeks to convert a child's supposed thought into a violation of the constitution of the United States is placing a meaning on that historic doctrine which would have surprised the founding fathers.

2. There was a conflict in the evidence at the trial in the district court on several issues of fact, (1) as to whether the children took a "devotional attitude" in reciting the verse in question, (2) whether some children said "amen" and "crossed themselves" and (3) whether the children's heads were bowed or they looked either at each other, at the teacher, or at the food. The court found as to these matters that it was "not convinced" that such devotional acts actually occurred. This is a finding of fact which is not clearly contrary to the manifest weight of the evidence and this court has no right, under 28 U.S.C.A. rule 52 (a), to make a contrary finding.

3. The district court concluded that this is a case "de minimis". The court supported its conclusion by saying:

> "* * * Despite the theologians' characterization of this verse as a prayer, the court believes that set in the framework of the whole school day, its purpose was not to pray but to instill in the children an appreciation of and gratefulness for the world about them—the birds, the flowers, the food, and everything. They asked no blessing; they sought no divine assistance.
>
> "The teacher was exercising her pedagogical function of making the pupils socially acceptable persons, as well-mannered guests, grateful in their appreciation of their provider. * * *
>
> * * * * *

"The court believes that this case presents the situation characterized by Justice Goldberg in the Schempp case,[2] supra, at 308, thus:

> 'It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.' "

I agree that this is a case *de minimis.*

I would affirm.

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[2] *Abington School Dist.* v. *Schempp,* 374 U.S. 203 (1963), Justice Goldberg's concurring opinion.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago, Illinois 60604.

Wednesday, July 26, 1967.

Before

Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Luther M. Swygert, Circuit Judge.
Hon. Thomas E. Fairchild, Circuit Judge.

LYLE A. DESPAIN and MARY R. DESPAIN, *et al.*, etc., *Plaintiffs-Appellants,* vs. DEKALB COUNTY COMMUNITY SCHOOL DISTRICT 428, *et al.*, etc., *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 15836	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, in accordance with the opinion of this Court filed this day.